Supreme Court, U.S.
FILED
MAR 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1729

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

---

CAPLIN & DRYSDALE, CHARTERED,

*Petitioner*,

v.

UNITED STATES OF AMERICA

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

## REPLY BRIEF FOR THE PETITIONER

---

*PETER VAN N. LOCKWOOD
GRAEME W. BUSH
ALBERT G. LAUBER, JR.
JULIA L. PORTER
ROBERT L. COHEN

CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES





## Table of Authorities Continued

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

---

**No. 87-1729**

---

CAPLIN & DRYSDALE, CHARTERED,
*Petitioner,*

v.

UNITED STATES OF AMERICA

---

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

---

## REPLY BRIEF FOR THE PETITIONER

---

### I. THE COMPREHENSIVE FORFEITURE ACT OF 1984 AUTHORIZES PETITIONER TO RECOVER ITS FEES FROM DEFENDANT RECKMEYER'S FORFEITED ASSETS

In arguing that the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 2301, 98 Stat. 2044, 2192-2193 ("the 1984 Act") authorizes, indeed requires, denying our claim to the fees and expenses incurred in defending Christopher Reckmeyer against CCE and tax evasion charges, the government contends (i) that we are improperly asserting rights previously abandoned by our client and (ii) that, in any event, the federal courts have no discretion under the statute to exempt from forfeiture assets which the defendant seeks to use to pay for necessary living expenses and attorneys fees prior to his conviction for the offenses on which the pro-

posed asset forfeiture is based. As shown below, both lines of argument are unavailing.

**A. Petitioner Is Not Barred From Advancing Its Statutory Claim**

The government's threshold contention (U.S. Br. 11, 16-19) is that we are foreclosed from making the statutory argument that constitutes the principal submission of our opening brief (Pet. Br. 11-33). The government bases this contention on two alternative theories. First, it says that 21 U.S.C. § 853(n)(6) affirmatively limits the arguments that a third party can make in a proceeding such as this, and that our statutory argument is not among the permitted claims (U.S. Br. 11, 17-19). Second, the government asserts that, even if our argument were otherwise cognizable, Reckmeyer has already waived it irrevocably (U.S. Br. 16-17). Both theories are meritless.

1. This case began with a motion by defendant Reckmeyer to modify a restraining order against his assets so as to exclude therefrom, and from subsequent forfeiture, funds sufficient to pay his defense counsel (J.A. 43-48). At a hearing on that motion, the district court directed that, as a result of Reckmeyer's guilty plea, petitioner must instead seek payment of its fees by asserting a claim under 21 U.S.C. § 853(n) (J.A. 54-55).[1]

The government in essence contends that the only arguments permissibly advanced by a third party in a Section 853(n)(2) proceeding are the two arguments that would produce a favorable judgment under Section 853(n)(6)—*viz.*, that

[1] Section 853(n)(2) provides in pertinent part as follows:

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may * * * petition the court for a hearing to adjudicate the validity of his alleged interest in the property.

Section 853(n)(6) in turn provides that, if the third party establishes that his claim is superior to the government's, or that he was a good-faith purchaser without reason to know of the property's potential forfeitability, "the court shall amend the order of forfeiture" accordingly.



the third party has a superior claim or is a bona fide purchaser without notice. (U.S. Br. 17). In seeking to advance other statutory and constitutional contentions, the government says, we are improperly attempting "to assert rights of Reckmeyer's" rather than to recover "in [our] own right" (*ibid.*).

This argument is a recasting of the standing argument that the government advanced unsuccessfully in the district court (J.A. 77-78). The government repeated that contention, somewhat obscurely, in the court of appeals.[2] The *en banc* court rejected the government's argument on standing (*see* Pet. App. 7a-8a), and, perhaps as a result, the government raises the point only obliquely here (citing no authority for its position). In any event, our standing to assert injury from an assertedly erroneous statutory interpretation which has resulted in over $195,000 in fees and expenses owed to us (including $35,000 in fees actually paid to us) allegedly becoming the property of the federal government is clear, even if it was our client's rights that were initially violated by the restraining order here. *Compare Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976).[3]

[2] *See* U.S. Br. 47-50, *United States v. Bassett et al.*, Nos. 86-5069, 86-5025, and 86-5050 (filed Aug. 7, 1986).

[3] The government cites Section 853(k) as a bar to our statutory argument (U.S. Br. 17). But that subsection simply prevents a third party from intervening in or otherwise disrupting the criminal case. Section 853(k) does not purport to limit the *arguments* that a third party can advance in other proceedings (such as this) brought under Section 853(n)(2). Nor does subsection (n)(2) itself limit the universe of legal arguments that a third party can advance to support "the validity of his alleged interest in the [forfeited] property." Section 853(n)(6) does specify two arguments that will necessarily prevail, and we have conceded that we cannot advance those particular arguments successfully. But we contend that "the validity of [our] alleged interest in the [forfeited] property" is supported by other statutory arguments under Sections 853(c) and 853(e)(1)(A)—that funds needed to pay Reckmeyer's attorneys' fees should never have been restrained in the first place, nor should they have been included in any judgment of forfeiture entered against Reckmeyer. There is nothing in Section 853(n)(2), or elsewhere in Section 853, that prohibits us from advancing these contentions and, if they are correct, no apparent reason

2. The government's alternative, and more vigorously pressed, argument is that we are barred from advancing our statutory claim because Reckmeyer "pleaded guilty and as part of the plea agreement consented to the forfeiture of all the property identified in the indictment" (U.S. Br. 16). By agreeing to forfeiture of his assets, Reckmeyer assertedly "waived the claim" that we seek to advance (*ibid.*). Because principles of finality would now prevent Reckmeyer himself from retracting his waiver, the government concludes that we are "not entitled to prevail on the argument [that we are] making in this Court" (*id.* at 19).

The government invokes this "waiver" theory only against the "equitable discretion" line of argument that we derive from Judge Winter's concurring opinion in *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.), *cert. granted*, No. 88-454 (Nov. 7, 1988). But the government's "waiver" theory cannot logically be so confined. It would necessarily bar *any* statutory or constitutional argument that we might present, since the objective of any such argument would be to seek recovery from assets that Reckmeyer by his guilty plea "consented" to forfeit. The government did not advance this "waiver" theory in response to any of our arguments in either court below.

Assuming *arguendo* that the government's argument is properly presented, it is wrong, for it erroneously assumes that a stakeholder can waive the claim of a real party in interest. Had the district court's restraining order not been entered, or had it been modified pursuant to Reckmeyer's motion to permit him to pay reasonable attorney fees, the entire amount at issue would have belonged to us on May 17, 1985, the date on which Reckmeyer consented to forfeiture.[4] It is obvious that, at the time Reckmeyer consented to the forfeiture of all "his" assets (including $25,480 then in our possession), he was no longer a real party in interest

why Congress would ever have chosen to prohibit their being raised by us.

[4] As of May 17, 1985, Caplin & Drysdale was no longer representing Reckmeyer, as shown by the consent decree itself (J.A. 64).



with respect to the sums at issue. Those funds would inevitably become the property of either the government or us; accordingly, Reckmeyer no longer had any economic stake in their disposition. Thus, the government's argument amounts to a contention that a stakeholder can waive the claim of one creditor and award the disputed sum to a competing creditor—a contention unsupported by reason, common sense or the cases the government cites.[5]

Acceptance of the government's "waiver" theory would produce an inequitable and anomalous result. If our statutory argument is correct, the government by hypothesis will have wrongly utilized the statute's restraining-order provisions to prejudice an innocent third party. It would be both unprecedented and unfair if the government could immunize that wrong from legal challenge by having Reckmeyer, who lacked any remaining economic interest in the disputed assets, waive our rights by consenting to forfeiture. The government's "waiver" theory would also create ethical problems in other cases if the Court were to decide in favor of our statutory argument in the pending *Monsanto* case. Any lawyer who had to advise his client about entering a guilty plea prior to a judicial determination exempting his fees from forfeiture, knowing that the plea would operate

[5] In the only opinion cited by the government (U.S. Br. 17) that is even arguably on point, *United States v. Pemberton*, 852 F.2d 1241 (9th Cir. 1988), it is unclear whether (i) the legality of the restraining order had ever been attacked; (ii) the defendant had other assets that could have been used to pay his lawyer; (iii) the attorney involved had agreed to the forfeiture stipulation; or (iv) the attorney had ever asserted a claim to the forfeited assets in his own name (as we did here prior to the forfeiture consent decree). In any event, if *Pemberton* can be read to hold that a defendant can waive his counsel's claim to assets that counsel would have received but for an invalid restraining order, *Pemberton* was wrongly decided. The other cases cited by the government (U.S. Br. 17 & n. 8) are off point. In *United States v. Fischer*, 833 F.2d 647 (7th Cir. 1987), no third party's rights were involved. In *United States v. Alexander*, No. 88-1324 (2d Cir., Feb. 21, 1989) (WESTLAW, CTA2 Database), there was no pretrial restraint of assets and, it appears, the attorneys never asserted a pre-conviction claim to the property. Indeed, the principal dispute was whether the government had *agreed* to permit payment of attorney fees out of the forfeited assets, an issue the court of appeals did not resolve.

as a waiver of the lawyer's own rights, would face a severe and unavoidable conflict of interest. In sum, this Court should not create a precedent that would enable stakeholders to destroy the property rights of real parties in interest.

### B. A District Court Has Discretion To Exempt From Forfeiture Assets An Indicted Defendant Needs For Ordinary Living Expenses And Reasonable Attorneys Fees

Apparently realizing the controlling force of the precedent from this Court cited by us for the proposition that a clear Congressional statement is required to divest federal courts of their normal equitable discretion in determining whether to grant injunctive relief (Pet. Br. 14-16), the government argues that the restraining order and forfeiture provisions of the 1984 Act, which on their face grant such discretion, must be read, in light of other provisions of the statute, as denying any judicial discretion to exempt assets to pay an indicted defendant's ordinary living expenses and attorneys fees prior to conviction.

The government first claims that the language of Section 853(a), which describes the various categories of property a convicted defendant "shall forfeit", controls the meaning of the word "may" in Section 853(c), which describes the consequences of a transfer of forfeitable assets to third parties. Having established to its satisfaction that no judicial discretion exists under Section 853(c) to exempt any third party not described in Section 853(n)(6) from the consequences of forfeiture of assets previously transferred by a defendant, the government then argues that the use of the term "may" in Section 853(e)(1)(A), in describing a court's power to restrain a defendant's assets, likewise imparts no discretion because such an exemption would limit the impact of the forfeiture mandated by Section 853(a).

The probable reason for the government's reversal of the chronological order of argument presented by us (and used by Judge Winter in his concurrence in *Monsanto*) is that it allows the government to downplay the problems presented by *pretrial* restraining orders by emphasizing the breadth



of *post-conviction* forfeiture penalties. This in turn enables the government to argue that orders dealing with interim relief, such as temporary restraining orders, should not control the ultimate outcome of a case. This approach would make sense in the ordinary case where restraining orders are simply used to preserve the status quo pending a final determination of the parties' rights. But it is wholly inappropriate in this case because the impact of the type of restraining order at issue here is not to preserve the status quo but rather to alter it dramatically by beggaring the defendant. Moreover, that alteration permanently deprives an indicted defendant of his ability to retain private defense counsel and materially lessens his ability to defend against the very charges on which the restraining order is based. Thus, the critical inquiry here, contrary to the government's view, must focus on the statutory scheme as it controls the respective rights of the government and the defendant *prior* to conviction.

1. The government's principal argument with respect to the post-indictment restraining order provisions of Section 853(e)(1)(A) is that a court cannot exempt assets from forfeiture so as to permit their expenditure on necessary living expenses and attorneys fees because the sole purpose of the provision is "to preserve" assets for forfeiture and, by definition, exempting assets from forfeiture defeats that purpose (U.S. Br. 27-28).[6] This argument assumes that the

[6] The government suggests that our interpretation of Section 853(e)(1)(A) will give rise to "anomalies" because there is no mechanism for excluding property from forfeiture in the absence of a government request for pretrial restraints (U.S. Br. 28 n.15). This argument is misplaced because it erroneously assumes that this Court will interpret Section 853(c) to deny lower courts discretion to exempt necessary living expenses and attorney fees from forfeiture (*see infra* at 10-14). If the Court permits such exemption, then lawyers and other providers of necessities will be confident that they will be able to retain amounts received from an indicted defendant, even without a court order, and the government will, as a result, not be "deterred" from seeking injunctive relief to bar the defendant from making other nonprotected transfers of assets. Furthermore, in appropriate circumstances, a defendant can seek declaratory relief from the trial court on this score. *See, e.g., United States v. Bassett*, 623 F. Supp. 1308 (D. Md. 1986).

purpose for granting a restraining order must control the reasons for denying one, a contention totally inconsistent with the standards normally governing equitable relief (Pet. Br. 15-16).

Although conceding that a court has discretion to grant or deny a restraining order under Section 853(e)(1)(A), the government adamantly insists that a hardship-based exemption for living expenses and attorneys fees "has no basis in equity practice" and is unauthorized by the statute (U.S. Br. 29-31). The government's assertion about "equity practice" is an *ipse dixit* unsupported by any authority and is flatly wrong. *See* Pet. Br. 20 n.9. Its statutory argument is based entirely on a negative implication drawn from Section 853(e)(1)(B) which expressly permits the court to take into account the "hardship" to the defendant when considering the issuance of a pre-indictment restraining order, while Section 853(e)(1)(A) has no comparable language with respect to post-indictment restraining orders. The government attempts to bolster its argument by citing legislative history to the effect that the "stringent standard" for pre-indictment restraints does not apply to post-indictment restraining orders (U.S. Br. 31).

As we have previously noted (Pet. Br. 17 n.6), the "stringent standard" of subsection (e)(1)(B) to which the government refers has two components, neither of which is rendered meaningless by Judge Winter's interpretation of subsection (e)(1)(A). The first is the need for the government to show a "substantial probability" that it will prevail on the forfeiture issue, a requirement that concededly is satisfied under subsection (e)(1)(A) by the indictment itself. The second component is the balancing of the need to preserve the property against the hardship to the party restrained. The balancing of hardship test in the pre-indictment stage is similar to but less restrictive than the traditional equity concept of "irreparable injury" applicable in the post-indictment context.

One can envisage many hardships, such as loss of access to funds to pursue advantageous business opportunities,



which would properly be taken into consideration in the pre-indictment balancing test mandated by subsection (e)(1)(B), but which would not rise to the level of irreparable injury resulting from forced indigency which would be prohibited under Judge Winter's interpretation of subsection (e)(1)(A). In any event, the statutory reference to a balancing of hardships in the pre-indictment context cannot be read as a clear statement of Congressional intent to divest the federal courts of their normal equitable discretion when considering the issuance of restraining orders in the post-indictment context. *See* Pet. Br. 13-14.

In support of its position, the government consistently trivializes the defendant's interests at stake and exaggerates its own. Moreover, the government assiduously ignores the fact that restraining orders of the sort at issue here involve the *de facto* infliction of a criminal forfeiture penalty on an unconvicted defendant under the guise of preserving the status quo. For example, in discussing the injury inflicted by a restraining order, the government "doubt[s] that it imposes an unreasonable hardship on a defendant to prohibit him from enjoying the economic benefits of his criminal activities" (U.S. Br. 30). Such rhetoric is hardly an accurate depiction of the situation faced by a defendant who may (contrary to the government's premise) be innocent of the crimes charged but who is being deprived of his ability to pay for life's necessities and to retain a lawyer to defend him.

In contrast, in characterizing the governmental interest at stake, the government quotes Judge Mahoney, dissenting in *Monsanto*, for the proposition that "*any* transfer to a third party of property otherwise subject to a restraining order frustrates * * * the expressly stated statutory purpose" (U.S. Br. 31-32). One is relegated to a footnote, however, to learn that the actual governmental interest at stake is that of maximizing revenue for the Department of Justice Assets Forfeiture Fund (*id.* at 32 n.16), which is the beneficiary of the difference between the defendant's payment of retained counsel at market rates and the government's

payment of appointed counsel at CJA rates for defending CCE and RICO forfeiture cases.

In sum, other than complaining that exempting the payment of necessary living expenses and attorneys fees from restraint pursuant to Section 853(e)(1)(A) is inconsistent with its view of the post-conviction reach of Section 853(c), discussed below, the government's arguments that federal courts lack discretion to limit the impact of a post-indictment restraining order by exempting necessary living expenses and attorneys fees are unsupported by the language of the statute and its legislative history. The government's position is also contrary to the canons of construction laid down by this Court for statutes dealing with injunctive relief. The government has altogether failed to address this authority, which is discussed in our opening brief (at 12-16).

2. We and the government do agree on one principle that should control the resolution of the statutory question in this case, namely, that a federal court should not have the discretion to exempt from a post-indictment restraining order property that the statute mandates shall ultimately be forfeited to the government upon the defendant's conviction. The disagreement between the parties is over the application of this principle. We contend that because necessary living expenses and attorneys fees must be exempt from pretrial restraint, they must also be exempt from post-conviction recapture from the payees by the government. The government contends that because payments made to third parties for goods or services, such as living expenses or attorneys fees, are not exempt from post-conviction forfeiture in the hands of the payees (except for bona fide purchasers under Section 853(n)(6)), such payments cannot be exempt from restraint prior to conviction.

As noted previously, the government initially bases its argument on Section 853(a), which mandates the forfeiture of various categories of property belonging to a person convicted of certain specified offenses (U.S. Br. 19-20). The fallacy of this argument is that Section 853(a) only addresses property belonging to a defendant at the time of his conviction. Here, Section 853(a)'s mandate has been satisfied—Reckmeyer has forfeited all his assets. Instead, the issue is whether assets claimed by us are forfeitable, a matter governed by Section 853(c).



Thus, the issue for this Court is the reach of Section 853(c), which governs forfeiture of assets transferred by a defendant prior to conviction, and its interplay with the restraining order provisions of Section 853(e)(1)(A). In the government's view, the only party having the right to retain forfeitable property transferred by a defendant prior to his conviction is someone who can demonstrate pursuant to Section 853(n)(6)(B) that he is a bona fide purchaser for value without reasonable cause to believe that the property was subject to forfeiture. Since we conceded below that we were unable to make such a showing, we must lose according to the government.

Section 853(c) expressly states that property forfeitable under Section 853(a) that is transferred to a third party "*may* be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) * * * that he is a bona fide purchaser for value of such property * * *" (emphasis added). Under the government's reading of the provision, the word "may" in the first clause means "shall".[7] However, contrary to the government's position (U.S. Br. 21-22), the fact that subsection (n) is the only stated exception to the words "shall be ordered forfeited" in the second clause does not, as a matter of semantics or logic, indicate that the word "may" in the first clause means "shall". Indeed, the contrary interpretation that "may" connotes discretion is more natural,

---

[7] With respect to the government's "conceptual difficulties" concerning a discretion that can only be exercised "one way" (U.S. Br. 20), a court asked to exempt payments to third parties for necessities under Section 853(c) will have to determine whether the payments were legitimate, whether the items or services purchased were in fact necessities and whether the prices paid were reasonable. Considerable discretion will be required in making those judgments.

particularly in light of the number of times the word "shall" is used in other subsections of Section 853.

The government attempts to explain away the use of the word "may" in Section 853(c) by contending that it is "simply language of authorization for the jury" (U.S. Br. 22). While creative, the government's argument nowhere explains why "shall" would not be an equally appropriate term of jury authorization. *Compare* Fed. R. Crim. P. 31(e) ("a special verdict shall be returned"). In any event, the language of Section 853(c) grants discretion to someone, and neither the statute nor its legislative history expressly states that such discretion is limited to the jury.

The fact that a different provision of the statute, Section 853(i)(1), gives the Attorney General the power to remit forfeiture after conviction by no means indicates, as the government urges (U.S. Br. 23), that a federal court lacks discretion under other sections of the same statute to exempt assets from forfeiture prior to or after conviction.[8] Significantly, the government provides no authority for its novel statutory interpretation argument on this point.[9] The government's further contention that a finding of judicial discretion here would constitute "sub silentio" Congressional authorization simply ignores our argument based on the express statutory language. The most that can be said about

---

[8] The argument that allowing a federal court to exempt the use of defendant's assets to pay for living expenses and costs of defense prior to conviction would authorize the court "to give away" property of the United States (U.S. Br. 24) is a specious use of the relation-back fiction. The fact is that in reality the contested property does not become that of the United States until a forfeiture judgment is entered following conviction.

[9] *United States v. Von Neumann*, 474 U.S. 242 (1985), cited by government (U.S. Br. 23), in which the issue was the timeliness of the Customs Service's action on a petition for remission from forfeiture, can at best be read to support the proposition that in other instances Congress has given the Executive Branch discretion to remit forfeitures. The relevance of Article II, § 2 of the Constitution is even more opaque since allowing a defendant limited access to his contested assets before conviction hardly constitutes a reprieve or pardon of the criminal offense with which he is charged.



Congressional intent as it relates to the use of the term "may" in Section 853(c) is that there is no legislative history that directly speaks to the point.

The government further attempts to negate the existence of judicial discretion under Section 853(c) by citing the Senate Report on the statute and several court of appeals cases for the proposition that forfeiture is "mandatory" (U.S. Br. 24-26). What the government neglects to point out is that both the legislative history and the cases it cites deal with the RICO and CCE provisions that govern forfeiture of property owned by the defendant following his conviction.[10] Neither the Senate Report nor any of the cited cases deal with Section 853(c) or with the rights of the defendant to make property transfers prior to conviction for living expenses or attorneys fees. Since no issue is presented here concerning some asserted right on the part of Reckmeyer to avoid a post-conviction forfeiture of his own assets, the government's authority is simply irrelevant.

The government's subsequent *ipse dixit* that the "reasons for this mandatory rule are not diminished when the property has been transferred to a third party" (U.S. Br. 26) totally ignores the difference between mandating the imposition of a particular penalty upon the defendant after conviction and mandating the same penalty prior to conviction either by making it impossible for a defendant to use his assets or by penalizing legitimate transferees of those

---

[10] 18 U.S.C. § 1963(a) (Supp. IV 1986); 21 U.S.C. § 853(a) (Supp. IV 1986). Thus *United States v. L'Hoste*, 609 F.2d 796, 809-13 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980), and *United States v. Godoy*, 678 F.2d 84, 87-88 (9th Cir.), *cert. denied*, 464 U.S. 959 (1983), both cited in the Senate Report on the bill, S. Rep. 98-225, 98th Cong., 2d Sess. 191, 200 n.25 (1984), involved assets owned by the defendant at the time of his conviction as to which the issue was whether the district court had discretion to ignore the jury's forfeiture verdict. *United States v. Hess*, 691 F.2d 188, 190 (4th Cir. 1982); *United States v. Kravitz*, 738 F.2d 102, 10406 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. Busher*, 817 F.2d 1409, 1414 (9th Cir. 1987); and *United States v. Perholtz*, 842 F.2d 343, 369 (D.C. Cir.), *cert. denied*, 109 S. Ct. 65 (1988), are all to the same effect.

assets on the ground they were aware of the government's charges against the defendant.

Contrary to the government's repeated assertions of Congressional intent to achieve the result it seeks here, the legislative history of the 1984 Act is utterly devoid of any indication that Congress made a considered judgment that maximization of the revenues flowing into the Department of Justice Assets Forfeiture Fund justifies empowering the government to compel the federal courts, by indictment alone, to beggar defendants prior to conviction and to deprive them of the means to employ private counsel to defend them. While we submit that the 1984 Act's literal language empowers federal courts to exempt from pretrial restraint and post-conviction forfeiture sufficient assets for a defendant to live and defend himself, at best the government's counter-arguments demonstrate statutory ambiguity and lack of Congressional focus on the issue. Under these circumstances, Judge Winter's invocation in *Monsanto* of this Court's rule that "statutes capable of differing interpretations should be construed to avoid constitutional issues", 852 F.2d at 1409, should also be applied by this Court.

## II. THE SIXTH AMENDMENT BARS CONGRESS FROM ELEVATING THE GOVERNMENT'S FINANCIAL INTEREST IN MAXIMIZING THE PROCEEDS OF FORFEITURE OVER A DEFENDANT'S RIGHT TO USE HIS ASSETS PRIOR TO CONVICTION TO PAY FOR RETAINED COUNSEL

In the preface to its discussion of the constitutional issues, the government mischaracterizes the context in which this Court is called upon to decide those questions in two materially important respects. First, it urges that substantial deference is due to the "carefully considered decision" of Congress in its enactment of the 1984 Act (U.S. Br. 33). Whatever else may be said about the legislative history of the 1984 Act, it is quite clear that Congress devoted no consideration at all either to identifying or resolving the issues presented by (i) pretrial restraints on a defendant's assets which would prevent the retention of private counsel or (ii) post-conviction forfeiture of assets previously paid as



legitimate attorneys fees. Indeed, as we have previously argued, the absence of such careful consideration by Congress is itself a basis for this Court to interpret the statute to avoid constitutional problems (Pet. Br. 33-34).

Second, the government, following the Fourth Circuit majority below, seeks to raise the spectre of "the grave national problem of narcotics trafficking" (U.S. Br. 33) as a reason to uphold the constitutionality of interpreting the statute to permit the government to deprive accused drug dealers of any ability to retain private defense counsel. However, the forfeiture provisions at issue in this CCE case are identical to those contained in the RICO statute, 18 U.S.C. § 1963(a)-(m) (Supp. IV 1986), and thus apply to a veritable panoply of white collar economic crimes.[11] Moreover, there is no limiting principle that would bar application of the forfeiture laws to any crime from which the accused derived economic benefit, such as tax evasion (*see* Pet. Br. 45). Thus the constitutional rights at stake here are those of all persons whom the Congress has determined, or may in the future decide, should be punished by, *inter alia*, being compelled to forfeit their "tainted" assets[12] pursuant to a statutory scheme such as that established in Section 853.

1. Initially, the government makes a half-hearted attempt to suggest that we lack standing to raise the constitutional

---

[11] *See* 18 U.S.C. § 1961(a)(1) (Supp. IV 1986), which defines "racketeering activity" to include, *inter alia*, bribery, sports bribery, gambling, counterfeiting, embezzlement from pension and welfare funds, mail fraud, wire fraud, sales of obscene materials, money laundering, interstate transportation of stolen property, trafficking in contraband cigarettes, securities fraud and violations of the currency and foreign transaction reporting statute.

[12] Such assets are not, as the government sometimes suggests, limited to "proceeds" of crime or assets that were "illegally derived" (U.S. Br. 33). They include assets obtained wholly legitimately if such assets are part of the defendant's interest in any enterprise that he has "established, operated, controlled, conducted or participated in the conduct of, in violation of [18 U.S.C.] section 1962." 18 U.S.C. § 1963(a)(2) (Supp. IV 1986). *See, e.g., United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987). *See also* 21 U.S.C. § 853(a)(3) (Supp. IV 1986).

issues in this case (U.S. Br. 35). To the extent this contention repeats the government's threshold argument, we have already addressed the point at pages 2-6, *supra*. If the government is suggesting that we lack *jus tertii* standing to raise Reckmeyer's Sixth Amendment rights, not only has the argument been rejected by every court that has considered it (*see, e.g.*, Pet. App. 8a), but the concept of derivative standing in situations such as this is well established. *See, e.g., Craig v. Boren*, 429 U.S. 190, 196 (1976); *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976).

2. The government attacks our Sixth Amendment claim by asserting that the Sixth Amendment is procedural not substantive, and hence that it could not compel a remedy that would "require[ ] the court to dismiss a portion of the underlying indictment" (U.S. Br. 38-39). Given that the statute makes clear that forfeiture is a criminal penalty which is imposed on a convicted defendant at the time of sentencing, Section 853(a), it is difficult to take this argument seriously. The fact that forfeiture allegations are in an indictment no more makes them an element of the criminal offense charged than would a recitation in the indictment of the sentence requested by the government.[13] The notion that authorizing use of assets described in the forfeiture count of an indictment to pay attorneys fees would somehow acquit a CCE defendant, such as Reckmeyer, of a violation of 21 U.S.C. § 848 can only be characterized as specious.

The government next argues that the Sixth Amendment does not apply because the statute does not provide for the forfeiture of attorneys fees "as such" nor does it "arbitrarily single out attorneys or their fees for adverse treatment" (U.S. Br. 39). Putting aside the fact that attorneys will be uniquely unable to satisfy the reasonably-without-cause-to-

[13] Indeed, the Second Circuit in *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980), has held that forfeiture allegations in an indictment need not specifically describe the property for which forfeiture is sought and that the grand jury need not consider whether particular property is forfeitable in rendering the indictment. This holding was based on the fact that statutory forfeiture is simply a criminal penalty. 633 F.2d at 1024-25.



believe requirement of Section 853(n)(6)(B), as compared with the house sellers, travel agents, car dealers, grocers, or accountants adverted to by the government, the fact that attorneys and their fees are not singled out for special mention in the forfeiture provisions proves nothing beyond an absence of Congressional intent to deprive a defendant of his ability to retain counsel.

As did the Fourth Circuit majority below, the government seeks to disclaim responsibility for a defendant's inability to retain private counsel when faced with either a restraining order covering all his assets or the threat of post-conviction fee forfeiture in the absence of pretrial restraint (U.S. Br. 40). Instead, the government blames the defendant's plight on his own conduct or on that of the Nation's attorneys who, lacking assurance of payment, decline to defend a CCE or RICO defendant faced with possible forfeiture of all his assets.

Contrary to the government's view, the defendant's impecuniousness is the direct result of governmental action. As the government implicitly acknowledges, the "various legal or practical circumstances" that render a defendant unable to employ counsel (U.S. Br. 38) result from the prosecutor's allegations of the defendant's criminal conduct and of the nature and extent of the defendant's forfeitable assets. Furthermore, the statutory scheme that permits, if this Court so holds, pretrial restraint of all an accused defendant's assets is invoked upon the request of the executive branch of the government, was enacted by the legislative branch of the government, and will be implemented by the judicial branch. In short, none of a CCE or RICO defendant's inability to employ counsel when faced with blanket forfeiture allegations is attributable either to the laws of economics or nature.[14]

[14] The government also contends that the ethical problems to which we refer (Pet. Br. 35-37) are "speculative" and seeks to minimize their significance (U.S. Br. 40 n.21). As to the possibility of a lawyer's seeking to remain in ignorance of his client's financial affairs so as to qualify as a bona fide purchaser under Section 853(n)(6)(B), it is not clear that an

Similarly, the government's attempt to take this case out of the Sixth Amendment arena by converting it into a property dispute in which the defendant's inability to employ counsel is simply a function of his prospective attorney's notice of the government's claim to superior title (U.S. Br. 41-42) is an effort to exalt form over substance. As we have previously noted (Pet. Br. 40-41), assets that are subject to a forfeiture indictment under Section 853 do not become the property of the government unless and until the defendant is convicted and a special verdict of forfeiture is

---

indictment will provide the requisite notice, particularly where the indictment describes forfeitable property in generic terms. *See, e.g., United States v. Grammatikos, supra*, note 13. Moreover, our concession that no defense counsel could satisfy the statutory standard was limited to ethical defense lawyers.

The government's finessing of the potential conflict of interest in the guilty plea context by arguing that Reckmeyer was not subject to such a conflict is both unresponsive to our point that such conflicts will be created by the statute in most cases, if the government's position prevails, and is particularly ironic given the government's previous argument that Reckmeyer's guilty plea and consent to forfeiture waive our rights to be paid our fees. Obviously, in the government's view, we should have persuaded Reckmeyer not to plead guilty until after the district court had ruled (as it subsequently did) in favor of releasing assets to pay our fees. Since such a delay might have resulted in the government withdrawing its proposed plea bargain, a clearer conflict of interest between Reckmeyer and us would be hard to imagine. The fact that this Court was willing to tolerate conflicts of interest on the part of attorneys handling civil rights cases, *Evans v. Jeff D.*, 475 U.S. 717 (1986), where the Sixth Amendment does not apply, hardly stands for the proposition that such conflicts are tolerable in criminal cases. *Compare, Wheat v. United States*, 108 S. Ct. 1692 (1988).

As to the government's suggestion that contingent fees in criminal cases raise no constitutional issues and that Congress could prefer such a regime to allowing attorneys to accept "drug money" as fees, the facts are (i) the vast bulk of lawyers simply will not take criminal cases involving forfeiture allegations absent assurance of payment because most such cases are lost either by plea or trial and the fees chargeable in the cases won will not offset the losses, (ii) there is no evidence that Congress ever considered the contingent fee problem when enacting the statute much less reached a "conclusion" about it, and (iii) the funds that defendants would be prohibited from paying their counsel are not limited to drug money but include many assets merely associated with the commission of the crime. *See* notes 11 and 12, *supra*.



entered. The relation-back fiction of Section 853(c) is a legitimate mechanism for preventing fraudulent conveyances of a defendant's assets prior to conviction. The question for this Court is whether it is also legitimate, in the context of the Sixth Amendment, for the government to use the relation-back fiction, coupled with pretrial restraining orders, to maximize the revenue effect of the criminal forfeiture penalty by depriving unconvicted defendants of their ability to employ any privately retained counsel for their defense.[15]

With respect to this issue, the government's brief is noteworthy for what it does not say as much as for what it does. For example, the government makes no attempt to refute the point that the effect of its interpretation of the CCE and RICO forfeiture provisions will be to impose a criminal penalty on defendants prior to conviction because, guilty or innocent, they will never be able to utilize private counsel in their defense. Similarly, the government makes no real effort to balance the public benefit of banning defendants from using their contested assets to defend themselves against the resulting injury to the defendants. Presumably the reason for this failure is the government's recognition that increasing the revenue flowing into the Department of Justice Assets Forfeiture Fund (U.S. Br. 32 n.16) does not weigh heavily against a defendant's interest in employing his counsel of choice.

---

[15] The government's bank robbery analogy (U.S. Br. 43) is grossly misleading since it totally ignores the fact that the forfeiture provisions at issue here are penalties, like fines, not reclamation of property stolen from someone. While we agree that a defendant could not claim a Sixth Amendment right to utilize contraband or other property which cannot legally be possessed by anyone to pay his lawyer, that concession does not logically lead to the conclusion that money, which is fungible and, by hypothesis, has not yet been shown to have been illegally obtained, much less forfeitable, should be treated similarly. Despite the government's invocation of *Stowell v. United States*, 113 U.S. 1 (1890), to show the historical longevity of the "taint" theory of forfeiture, the fact remains that, as Judge Phillips stated in the original panel opinion in this case, the Sixth Amendment was drafted "on the assumption—indeed with the sure knowledge—that in exercising the primary right to privately retained counsel, ill-gotten gains might be used by defendants who would ultimately be found guilty" (Pet. App. 66a).

While the government has emphasized that a defendant will always be entitled to counsel appointed under the Criminal Justice Act and that such counsel must provide "reasonably competent assistance" (U.S. Br. 34), it does not have the temerity to contend that accused persons will be able to obtain under the CJA the quality of criminal defense available in this country from the private criminal defense bar. Granting the government the power, through forfeiture indictments and restraining orders, to prevent a defendant from employing any lawyer from the entire private defense bar will sanction an unprecedented governmental denial of the Sixth Amendment right to counsel of choice based solely on the government's financial interests. Such a wholesale shift in the working of our adversary system based on such skimpy governmental interests should not be countenanced by this Court.

## CONCLUSION

The decision of the Fourth Circuit *en banc* should be reversed, and the case should be remanded with instructions to reinstate the judgment of the district court in favor of petitioner.

Respectfully submitted,

*PETER VAN N. LOCKWOOD
GRAEME W. BUSH
ALBERT G. LAUBER, JR.
JULIA L. PORTER
ROBERT L. COHEN

CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

**Counsel of Record*

March 14, 1989